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Supreme Court, U.S.
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No. 00-1636

IN THE

Supreme Court of the United States

MICHAEL TEN EYCK, individually, THOMAS LINDERT, individually, CARMINE RESTIVO, JR., individually, and ROBERT THOUBBORON, individually,

Petitioners,

v.

JOHN LEATHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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THOUBBORON REPLY BRIEF

Respondent John Leather argues that a writ of certiorari should be denied because: (i) the Second Circuit did not decline to follow *Heck* but rather held it inapplicable to his case; and (ii) there is no conflict among the Courts of Appeals as to whether *Heck* is still good law. Neither argument is sound.

1. Contrary to respondent's argument and as the Second Circuit recognized, Leather's selective enforcement claim necessarily implied the invalidity of his state court convictions. If Leather was targeted for arrest because of his exercise of First Amendment rights, his prosecution would be invalid. *See 303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 694 (1979) (the "theory is that conscious discrimination by public authorities taints the integrity of the legal process to the degree that no court should lend itself to adjudicate the merits of the . . . action"); *see generally* LaFave, *et al.*, *Criminal Procedure* § 13.4. Moreover, the fact that Leather "never challenged his convictions" in his § 1983 action (Br. in Opp. at 5), but rather sought to obtain damages because of them is inconsequential. No one can challenge the validity of a conviction in a § 1983 damage action. *Heck*'s point is much different: to recover damages for harm caused by actions — in this case, selective enforcement — whose unlawfulness would render a conviction invalid, a § 1983 plaintiff "must prove that the conviction . . . has been reversed . . ." *Heck v. Humphrey* 512 U.S. 477, 486-87 (1994). Leather made no such showing, and thus, if *Heck* is still good law, his § 1983 action should not have proceeded.

2. Equally baseless is Leather's claim that the Courts of Appeals are not divided on *Heck*'s vitality. As noted in our petition, five circuits (the First, Fourth, Fifth, Sixth and Ninth) have observed that Justice Ginsburg's concurrence in *Spencer* casts doubt on *Heck*'s continued applicability in cases like this in which a § 1983 plaintiff has no recourse to federal habeas corpus, but have nonetheless concluded that *Heck* remains the governing rule. *See* Pet. at 8. Only the Second Circuit has announced a contrary position. The cases respondent cites do not indicate otherwise.[1] Indeed, two of the decisions, albeit unpublished, indicate that the Eighth Circuit and Seventh Circuit continue to apply *Heck* in cases in which a § 1983 plaintiff does not have a habeas corpus remedy. *See Scott v. Sutker-Dermer*, 2001 WL 436193 (7th Cir. Apr. 26, 2001) (dismissing § 1983 action of individual sentenced to probation because claim necessarily implied invalidity of state conviction); *Brooks v. Iowa Attorney General*, 2000 WL 1856331 at *1 (8th Cir. Dec. 20, 2000) (plaintiff could not bring § 1983 action for unconstitutional arrest until "his traffic convictions were set aside").

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1. Four cases respondent cites are irrelevant to the Circuit split. *Hector v. Watt*, 235 F.3d 154, 155 (3d Cir. 2000) (addressing "the narrow issue . . . of what type of damages [a § 1983 plaintiff] can obtain under the Fourth Amendment" in a case in which the state prosecution had been dismissed); *Mortimer v. Tritt*, 2000 WL 1578482 (4th Cir. Oct. 19, 2000) (applying *Heck* to bar § 1983 action challenging conviction where plaintiff was incarcerated); *Mehdipour v. Chapel*, 2001 WL 468010 (10th Cir. May 3, 2001) (dismissing, under *Heck*, § 1983 claim to recover damages for allegedly unconstitutional conviction where plaintiff had pending federal habeas petition); *Abella v. Rubino*, 63 F.3d 1063 (11th Cir. 1995) (predating *Spencer*).

3. Respondent argues that petitioners' failure to seek review of the Second Circuit's June 1999 interlocutory decision renders this petition time barred. This argument is mistaken. Although petitioners could have sought review of the Second Circuit's interlocutory judgment, they were not required to do so. *See* Stern, *et al.*, *Supreme Court Practice* § 4.18. Indeed, it is this Court's general practice not to issue the writ until there has been a final decree. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Urie v. Thompson*, 337 U.S. 163, 172-73 (1949).

CONCLUSION

For these reasons and those advanced in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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